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MasterCard International

Via Electronic Delivery

January 30, 2004

Ms Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Email:
regs.comments@federalreserve.gov

Re: Docket No. R-1168; Docket No. R-1171; Docket No. R-1169; Docket No. R-1170; and Docket No. R-1167

Dear Ms. Johnson:

Mastercard International Incorporated ("MasterCard")[1] submits this comment letter in response to the Proposed Rules ("Proposal") published by the Federal Reserve Board (the "Board') to establish a more uniform "clear and conspicuous" standard for providing disclosures under the Board's Regulations B, E, M, Z, and DD (collectively, the "Regulations"). Mastercard appreciates the opportunity to comment on the Proposal.

Over the years, the Board has developed an effective, well balanced approach to ensuring that the important disclosures required by the Regulations are presented in an appropriate form. For each of the Regulations, the Board has clearly articulated an appropriate standard and provided *general* guidance regarding how to meet that standard For example, Regulation Z makes it clear that its disclosures must be made "clearly and conspicuously" and the Commentary to Regulation Z clarifies "that [the] disclosures [must] be in a reasonably understandable form" and sets forth other helpful guidance in achieving this standard

Regulation B employs a similar approach and states that creditors providing disclosures must do so "in a clear and conspicuous manner." The Regulation B Commentary states that the clear and conspicuous standard "requires that disclosures be

[1] MasterCard is a SEC-registered private share corporation that licenses financial institutions to use the Mastercard service marks in connection with a variety of payments systems

presented in a reasonably understandable format in a way that does not obscure the required information. No minimum type size is mandated, but the disclosures must be legible, whether typewritten, handwritten, or printed by a computer." The other Regulations implement a similar framework.

The framework established under the Regulations ensures that an appropriate standard is articulated for each of the Regulations while providing flexibility so that each financial institution covered by the Regulations can best determine how to meet that standard in the context of that financial institution's products and relationships with its customers. The success of this approach is, in large measure, due to the considerable resources financial institutions and others devote to ensuring that their disclosures meet the applicable standards. It also is important to note that the federal agencies responsible for enforcing the Regulations have powerful tools available to ensure that those who fail to comply with the applicable disclosure standards are dealt with appropriately. For example, the federal banking agencies have broad examination authority through which any deficient disclosure requirements can be addressed. Moreover, the federal statutes implemented by the Regulations provide for strong administrative enforcement mechanisms which can be used to deal adequately with those who furnish deficient disclosures. We are not aware that the examination and enforcement process employed by the Board and other federal agencies has identified any widespread or significant deficiencies in any of the disclosure schemes implemented by the Regulations

Nevertheless, the Proposal appears to call for a comprehensive review of literally all of the disclosures required by the Regulations. Under the Proposal, all of the Regulations will be subject to a "clear and conspicuous" standard but the term "clear and conspicuous'' will no longer have the same meaning it has had for many years. Instead, the term will be redefined to mean "a disclosure [that] is reasonably understandable and designed to call attention to the nature and significance of the information in the disclosure." In addition, the official staff interpretations of the Regulations will be modified to include the following examples regarding the new clear and conspicuous standard.

> "1. Reasonably understandable. Examples of disclosures that are reasonably understandable include disclosures that:
>
> "i. Present the information in the disclosure in clear, concise sentences, paragraphs, and sections;
>
> "ii. Use short explanatory sentences or bullet lists whenever possible;
>
> "iii. Use definite, concrete, everyday words and active voice whenever possible;
>
> "iv. Avoid multiple negatives;

"v. Avoid legal and highly technical business terminology whenever possible; and

"vi. Avoid explanations that are imprecise and readily subject to different interpretations.

"2. Designed to call attention. Examples of disclosures that are designed to call attention to the nature and significance of the information include disclosures that:

"i. Use a plain-language heading to call attention to the disclosure;

"ii. Use a typeface and type size that are easy to read. Disclosures in 12-point type generally meet this standard. Disclosures printed in less than 12-point type do not automatically violate the standard; however, disclosures in less than 8-point type would likely be too small to satisfy the standard;

"iii. Provide wide margins and ample line spacing;

"iv. Use boldface or italics for key words; and

"v. In a document that combines disclosures with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, to call attention to the disclosures.

"3. Other information. Except as otherwise provided, the 'clear and conspicuous' standard does not prohibit adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, and translations; [it also does not prohibit] sending promotional material with the required disclosures. However, the presence of this other information may be a factor in determining whether the 'clear and conspicuous' standard is met."

This new approach to the "clear and conspicuous" standard is based on the disclosure standard adopted by the Board and other federal agencies in the regulations implementing the privacy disclosures required by the Gramm-Leach-Bliley Act ("GLBA') It is important to note that the GLBA privacy disclosures, including many of the model clauses adopted by the agencies to comply with the GLBA clear and conspicuous standard, have been extensively criticized by a wide variety of interested parties. Indeed, because of the widely held view that the GLBA disclosures may be in need of improvement, those disclosure requirements, including the clear and conspicuous standard, are presently the

subject of public comment. In view of the unusual difficulties experienced with the GLBA disclosures, it would not make sense to export the GLBA standard into the Regulations.[2]

Moreover, the GLBA approach embodied in the Proposal would have a number of unintended, but serious consequences for industry and consumers alike. Some of the most significant problems arise from the nature of the guidance provided in the Proposal itself. The Proposal sets forth guidance that might best be characterized as "helpful hints" or "tips" on how to draft disclosures. In essence, it describes the types of objectives one should ***strive*** for when drafting the disclosures required under the Regulations. In this regard, the contents of the Proposal would typically be found in a practice manual or other informal document rather than a federal regulation. By including these objectives in the Regulations and official staff interpretations, however, the Board has effectively converted a number of worthwhile objectives into regulatory requirements.

We appreciate that, by structuring the staff interpretations of the Proposal as "examples," the Board has attempted to avoid the implication that the interpretations constitute requirements. The practical reality, however, is that many interested parties, particularly in the plaintiffs' bar, will view the interpretations as required disclosure elements. Thus, those who seek to minimize their compliance and litigation risk in implementing the Proposal will have little choice but to treat the Proposal as a substantive change in law.

This means that the Proposal will affect every single disclosure required under the Regulations, from the relatively simple receipt requirements of Regulation E to the more complex disclosures applicable to open- and closed-end loans under Regulation Z. The Proposal appears to have been published without any analysis regarding how it impacts that long list of disclosures required under the Regulations. If the Proposal were adopted, compliance personnel at the thousands of entities subject to the Regulations would be required to review every one of the disclosure documents they currently use to comply with the Regulations. For many banks, this would involve literally hundreds of disclosure documents that would require painstaking review to determine whether, for instance, a particular "sentence, paragraph or section" is "clear" enough or "concise" enough. Those reviewing the disclosures would be forced to determine whether they are using "short explanatory sentences or bullet lists" in every instance possible. Other issues will come into play, such as whether the words in the disclosure are "definite" or "concrete" enough to satisfy the standard. Moreover, it is unclear how a drafter of a disclosure would determine with any degree of certainty whether the words in that disclosure constitute "everyday words," particularly because many of the required disclosure terms themselves are not found in everyday use. Similarly, because of the complexity of many of the disclosures required under the Regulations, avoiding "legal and highly technical business terminology" is difficult to achieve.

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[2] We also note that other federal agencies (most notably, the Securities and Exchange Commission) have experienced similar difficulties in implementing similar "plain language" requirements. These difficulties are avoided through the Board's longstanding, more **flexible** approach to the "clear and conspicuous" standard.

The net result of these detailed disclosure reviews will be that many financial institutions will conclude that changes are required to their existing disclosures regardless of whether those changes provide any meaningful benefit to consumers. (Indeed, it appears likely that even the Board will conclude that changes to its own model disclosures are required based on the new standards.) A preliminary assessment of the impact of the Proposal strongly suggests that the required disclosure changes will be extremely costly. For example, despite efforts to provide flexibility in the Proposal on typeface and type size, many financial institutions are likely to conclude that printing disclosures in anything smaller than 12-point type would be an invitation to litigation. As a result, many financial institutions will conclude that they are forced to increase the type size of their disclosures even in circumstances where there is no evidence that consumers have difficulty reading the current disclosures. This will increase the length of many disclosures and result in many instances of dramatic increases in postal costs. In this regard, preliminary estimates suggest that increased printing and postal costs alone would amount to millions of dollars each year. We are not aware of any problems with, or deficiencies in, the current "clear and conspicuous" or similar disclosure requirements that would warrant cost increases of that magnitude.

Moreover, there is deep concern that, because of the nature of the guidance provided in the Proposal, it will be extremely difficult to determine whether the new clear and conspicuous standards have been met. It must be noted that this is a highly unusual approach for the Board. Typically, the guidance provided by the Board under the Regulations sets forth clear standards for determining when compliance has been achieved. The Proposal does not.[3] For example, there will always be opportunity to debate whether a particular disclosure is presented with "ample line spacing" or in "concise" sentences, paragraphs, and sections. Similarly, reasonable minds will differ regarding whether the "key words" in a particular disclosure have been sufficiently highlighted or whether the disclosure uses "everyday words" or "short explanatory sentences or bullet lists whenever possible," or complies with the other features set forth in the Proposal. In short, because the standards created by the Proposal are inherently subject to a wide variety of interpretations, the Proposal would inadvertently result in an inappropriate degree of uncertainty regarding the extent to which required disclosures comply. Our experience strongly indicates that where such uncertainty exists, litigation is sure to follow. Financial institutions, including those who revise their disclosures based on the Proposal, will be forced to defend themselves in lawsuits based on plaintiffs' interpretation of the new requirements.

In essence, because the Proposal lacks any meaningful way of determining whether compliance has been achieved, it leaves it to the courts to determine what "clear and conspicuous" means. We urge the Board to prevent this result. In particular, we request that the Board withdraw the Proposal and consider whether any deficiencies exist in the

[3] The only exception is the type size requirement in which the Board makes it clear that disclosures in 12-point type will meet the new standard. As indicated above, however, we strongly believe the type size standard should be rejected for other reasons, including the substantial new printing and postal costs that would be imposed on financial institutions and others complying with the new requirement.

current disclosure standards under the Regulations. If any deficiencies are found to exist, we urge the Board to address those deficiencies more precisely in the context of the problematic disclosures themselves rather than adopting a sweeping change, such as the Proposal, which impacts all disclosures without any identifiable need to do so.

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If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Jodi Golinsky

Jodi Golinsky
Vice President
Legislative/Regulatory & Privacy Counsel

cc: Michael F. McEneney, Esq